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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 44

WILLIAM SKINNER, AUGUST R. GUELDNER and ALTON J. CHARBONNET,

Petitioners.

versus

STATE OF LOUISIANA,

Respondent.

On Writ of Certiorari to the SUPREME COURT OF LOUISIANA to review "State of Louisiana vs. William Skinner, et al", No. 48,445 of the Docket of That Court.

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONERS

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PAST RECORD OF CHARBONNET IRRELEVANT HERE

After argument herein the State of Louisiana submitted to the Clerk of this Court a letter in which was enclosed a document which was not contained in the record of this case below but which showed numerous prior convictions of petitioner Charbonnet. Request was made by the State of Louisiana that said document be presented to the Court and the purported reason for said oblique offer of the out-of-the record document was that it would tend to answer a question propounded by a member of the Court as to how

it came about that Charbonnet received so long a sentence for a marihuana violation, i.e. fifty years. The fact is, of course, that this query had been fully answered during oral argument when counsel for the State properly answered that under the Louisiana Habitual Offender Law, R.S. 15: 529.1, such sentence was justified. This fact was obviously conceded by petitioners in view of their complete silence as to the technical propriety of the term of fifty years, and their failure to question this lengthy term, either in brief or oral argument. Nor do we now challenge the technical propriety of such a lengthy term, provided of course the conviction here is valid. But, inasmuch as our able distaff opponent has come into Court belatedly waving a document which is heralded as showing NINE PREVIOUS CONVICTIONS it seems necessary that this "last word" offered by the State should be qualified by at least this much rejoinder: **None of the previous convictions were in any way involved with narcotics.** An examination of the document offered, which is, in fact a copy of an information which was the basis of sentencing Charbonnet in a separate case, No. 194-010 of the District Court, shows that all of the convictions of Charbonnet were for such crimes as theft, receiving stolen property and cognate offenses and that none appear to have involved narcotics in any way.

Logically, of course, it would make no difference to the validity of these proceedings what the previous convictions involved narcotics or an aggravated assault upon the Shah of Iran. But the rather transparent attempt here to inject the prejudicial image of Charbonnet as being a one man narcotic epidemic by saying simply that he had nine prior convictions is highly misleading.

The main thrust of the argument here as to Charbonnet, of course, is that he was deprived of due process by

failure to even notify him of the trial of several motions directly affecting his case, as developed in detail in our original brief.

PERTINENT RECORD REFERENCES

In oral argument certain questions were asked of counsel for petitioners and we now submit record references to bolster our oral answers thereto and to supplement portions of our original brief in which record references are lacking:

1.

THE NATURE OF THE PRE-TRIAL MOTIONS AS AFFECTING CHARBONNET

As we urged in our original brief, the pre-trial motions at which Charbonnet was neither present, represented or even notified, involved issues directly affecting him and vital to his case. These motions involved the taking of extensive testimony on two separate sessions, Oct. 8, 1965 (which appears first in record, Vol. 1, page 42 et seq) and Sept. 23, 1965 (which appears later, Vol. 1, page 73 et seq.)

The broad scope and effect of these hearings is clearly indicated by the following passage during the hearing of Sept. 23, 1965, the first hearing, wherein the following appears at Vol. 1, page 90:

"BY MR. SCIACCIA:

Your Honor, may I object at this juncture and say to the Court that as I understand it the matter before the Court is a motion to suppress the evidence.

BY THE COURT: We have two or three matters we are taking this testimony on. It is a Motion to Suppress and

Dismiss, A Motion to Quash and a Special Plea of Entrapment. I am trying to cut the trial as much as I can to let the testimony pertaining to the three issues. **Of course, if th testimony would pertain to any of the other propositions such as the Motion for Preliminary Examination and the Bill of Particulars * * * I was just trying to take the testimony of this gentleman and let it apply to as many of the pleadings as it applies to"** etc. (Emphasis added)

Again, at the second hearing of pre-trial motions held on Oct. 8, 1965, it was stipulated between the State and the defendants Skinner and Gueldner that, **on the hearing for preliminary examination the previous testimony of the undercover agent, Hebert, taken in connection with a motion to suppress, would be admitted in evidence.** (Vol. 1, R. 42)

In other words, as noted by the Court in the earlier quotation, what this procedure amounted to was that all of the evidence taken at either hearing would be admitted in evidence insofar as applicable to all pending motions.

PRELIMINARY HEARING HAS DOUBLE PURPOSE IN LOUISIANA

In Louisiana criminal procedure preliminary hearings are controlled by Articles 291 through 298 of the Code of Criminal Procedure. Article 295 of said Code provides, inter alia:

"The transcript of the testimony of any other witness who testified at the preliminary examination is admissable for any purpose **in any subsequent proceeding in the case,** on behalf of either party, if the court finds that the witness is dead, too ill to testify, absent from the state, or cannot be found" etc. (Emphasis added)

From the foregoing it is clear that, in addition to resolving the question of whether or not an accused should be held over for trial, a preliminary hearing may well serve as a means of gathering vital evidenec which in fact is later used at trial. Thus, by failing to notify Charbonnet of the various hearings on motions, and by failing to require his presence and representation at same, the Trial Court gave its blessing to a weird procedure whereby evidence usable later against Charbonnet might be gathered while he languished in jail and took no part in proceedings vitally affecting him. It is no answer to say that, in fact, none of the extensive testimony taken at the various pretrial evidence was offered, as such, at the actual trial. The point is that it was taken at a preliminary hearing, that it could have been used and that this sort of proceeding was something which obviously required that he be present and represented. Aside from the general rule throughout the country quoted at page 15 of our originla brief (from 14 Am.Jur.Sec.189, page 898) the established Louisiana rule, quoted at page 14 of our original brief, demanded that Charbonnet be present and represented at these vital hearings. As stated in a leading Louisiana case (State v. Pope, 39 So.2d 719, 214 La. 1026) The accused:

"* * * must be personally present at every important stage of the trial from the moment of the arraignment to his sentence, otherwise a verdict against him will be set aside."

NO WAIVER HERE

It has been urged that even if Charbonnet should have been present and represented at the pre-trial motions, when he finally obtained counsel who became active on his part and obtained a copy of the previous pre-trial proceedings, failure to demand similar hearings on behalf of Charbonnet

amounted to a waiver of whatever prejudice which had resulted.

The first answer to this is that, under Article 292 of the Louisiana Code of Criminal procedure after an indictment is found or an information is filed, the granting of a preliminary hearing is purely discretionery. This article provides:

"Before the finding of an indictment or the filing of an information the court, on request of the state or of the defendant, SHALL immediately order a preliminary examination in felony cases.

After the finding of an indictment or the filing of an information an order for a preliminary examination MAY be granted by the court at any time either on its own motion or on request of the state or of the defendant." (Emphasis added)

Therefore, since the granting of a preliminary hearing was discretionery even as to the hearings actually held (which all took place after the information was filed) it is highly unlikely the trial judge would have exercised his discretion a second time in favor of another preliminary hearing. As noted in our original brief on page 9, the Court had taken the position that Charbonnet did not have to be present or represented at hearing of the preliminary motions **because he had not filed them.** (Vol. 1, R.80) Thus, after these lengthy hearings had been held and after new counsel for Charbonnet had obtained a copy of these proceedings, it seems quite obvious that the trial judge would not have exercised his discretion in favor of a preliminary examination a second time and rehash the same matter virtually on the eve of the trial.

As noted in our oral argument, one reason why counsel for Charbonnet did not demand another preliminary hearing was that the copy of the proceedings which he had been furnished showed a serious error in the identity of the agent who allegedly purchased the marijuana. But over and above that strategic reason for not demanding a preliminary hearing or trial of other motions, the simple fact is that, if the proceeding at trial of these motions was deemed to be of the sort at which due process demanded that Charbonnet be present and represented, his constitutional rights could only be waived by him personally and knowingly and certainly could not be waived by any finely spun theory of implied waiver by non-action of counsel.

EXHAUSTED COUNSEL FAILED TO CALL IMPORTANT WITNESS

In our original brief we failed to give record reference as to the fact that Mr. Gill, ill and exhausted after an all night session, overlooked calling an important witness, a Mr. Keenan. Mr. Keenan testified (in Vol. 2, R.348) that he was a witness who could have testified that the 1960 Lincoln automobile in which the marijuana was found on the Skinner car lot, did not belong to Skinner.

During oral argument the question was asked as to whether or not this testimony would have been relevant. Clearly, we submit, it was relevant because the factual issues were hotly contested, even as to the basic facts related by the agents and even as to whether or not they were present at the time they claimed to have been. Vol. 3, R. 425). The weight of such evidence, of course, is debatable, but the real point here is that counsel for defendants would have leaped at this error by the State in suggesting that the contraband was found in Skinner's car when said

car actually belonged to someone else. That he failed to use this evidence, with a witness ready at hand, could only have been due to the fact that he was exhausted, as his doctor testified he must have been, and overlooked it.

Further evidence that Mr. Gill was exhausted, both physically and mentally, is shown by the fact that during final argument to the jury he was wandering in irrelevant remarks. He began to make a statement to the jury, in the form of personal testimony, which were objected to by the State and the objection was sustained. (Vol. 2, R. 247.)

The Supreme Court of Louisiana, in its majority opinion misses the point in declaring: (Appendix, page 45)

"We conclude that no matter what his physical feelings were, such feelings, as well as his physical condition, had no effect on Mr. Gill's intellectual ability **between 12:25 a.m. and 2:45 a.m., March 22, 1966.**" (Emphasis added)

Of course the condition of Mr. Gill between the early morning hours noted by the Court was not the most important period at all. The most important period was that from 9:30 a.m. till the end of the trial when, after an all night session, and precious little rest, counsel was forced to proceed with argument. It was at this period that his most grievous errors were committe, i.e. failure to put on the witness Keenan and his weak and wandering argument. But the Court says nothing of this crucial period, and concludes, from most superficial evidence that simply because "he reserved bills of exception and engaged in colloquy with the Court," he was "astute and vigorous." In the face of the uncontradicted medical testimony that a man in his condition would be reduced to zero efficiency after twelve hours, it is difficult to understand this con-

clusion. As noted by his doctor in extensive testimony, Mr. Gill was eventually hospitalized for a substantial period, largely as a result of this gruelling session.

Finally, it should be noted that the long hours, wholly uncalled for, not only exhausted counsel and caused at least two jurors to fall asleep, but the judge himself was not at his shining best. He became confused and gave a full blown charge of conspiracy (where none was charged in the information) and this error formed the sole basis of the reversal in the original opinion. In addition, his weariness doubtless led to the error noted (but not presented here) wherein he got hold of the wrong and of the best evidence rule. (Bill of Exceptions 24, R.231)

As to the condition of the jury after the all night session there can be little doubt that at least two of them went to sleep and all of them were more or less comatose.

For all of the above reasons we submit that this was a travesty of a trial and the judgment below should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Geo. M. Leppert, of counsel for petitioners and a member in good standing of the bar of the Supreme Court of the United States hereby certify that a copy of the foregoing supplemental brief has been served upon the District Attorney for the Parish of Orleans, State of Louisiana and the Attorney General of Louisiana, by mailing same, postage prepaid, to their respective offices on the——day of Jan. 1969.

Geo. M. Leppert